

April 29, 2014

VIA EMAIL & US MAIL

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United States Environmental Protection Agency, Region 10
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CONFIDENTIAL

Dear Ms. Schmidt:

This letter responds to EPA's undated General Notice Letter and CERCLA 104(e) information request, which I received on approximately March 13, 2014. On March 31, Ted Yackulic confirmed to my attorney, Patricia Dost, that the letter was addressed to me in my individual capacity (and not to Water Conservation Technologies Inc.) and that EPA would allow me until April 30, 2014 to submit my response.

Respectfully, EPA's determination that I may be a potentially responsible party at the Queen Avenue or Ferry Street sites formerly leased by Absorbent Technologies, Inc. (ATI) is in error.

As EPA is aware, ATI produced a soil amendment marketed as "Zeba." ATI sought reorganization under Chapter 11 of the bankruptcy code in March 2013. Between March 2013 and October 7, 2013, ATI worked extremely hard to raise money to resume production. On October 7, however, the Bankruptcy Court allowed David and Pam Ellis and Farouk Al-Hadi (collectively, FHA), the owners of the Queen Avenue property, to terminate ATI's lease of that property. ATI lost possession of the Queen Avenue factory and all of its contents on October 11. Having been compelled by the court to surrender its principal manufacturing facility to the landowner, ATI was forced to convert the bankruptcy proceeding to a Chapter 7 liquidation.

At the time ATI lost possession of the Queen Avenue factory, raw materials for production of Zeba, including approximately 2700 gallons of acrylonitrile, were present at the property. Neither ATI nor any of its employees considered these raw materials "wastes;" they were feedstock for the production ATI was attempting to resume. The acrylonitrile was fully contained within a storage tank equipped with secondary containment, several alarms and detectors, a foam fire suppression system, and a protective nitrogen blanket. The Albany Fire Department described the acrylonitrile storage as "super stable" and stated, "Absorbent Technologies used state-of-the-art equipment and everything is very clean."¹ As I understand it, on October 15, the Albany Fire Department requested EPA's assistance with removal of the acrylonitrile from the Queen Avenue facility, and EPA removed the acrylonitrile on October 22, 2014. By October 15, neither ATI nor any of its employees had access to the factory or to ATI's equipment or inventory.

I served as ATI's Chief Financial Officer between January 2003 and September 2012. ATI's manufacturing operations were suspended in April 2012, and, in September 2012, ATI's Board of

¹ "Hazardous Materials Removed at Absorbent Technologies Plant," Albany Democrat Herald (October 22, 2013).

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Directors promoted me to Chief Executive Officer as part of an effort to secure additional capital that would have allowed ATI to resume production. For the entire duration of my employment by ATI, including my tenure as CEO, my sole responsibility was to raise money for the company and manage the company's relationships with investors and lenders. I personally own less than 1% of ATI's stock.

Background Information:

I met Milan Savich in the fall of 2002. He was a chemist who had spent five years with two other chemists developing a superabsorbent corn starch soil amendment (eventually called Zeba) which increased agriculture crop yields 10% with 10% less water. Milan knew how to make one pound of Zeba in a beaker in a lab. He believed that with proper funding, he could eventually build a factory that would manufacture millions of pounds a year. I agreed to co-found ATI with Milan in January 2003. Milan was the CEO, with the responsibility for running the factory and testing Zeba in the field. I was the CFO, responsible for raising the money for the factory and the field trials.

During the period from 2003 through 2008, I raised \$500,000 per month from 500 private investors. The total amount raised exceeded \$35,000,000. Milan found a warehouse on Ferry Street in Albany, Oregon and started to buy equipment and learn how to manufacture hundreds of pounds of Zeba per day. One of the raw materials for Zeba is acrylonitrile (ACN). ACN is used in many factories in the Midwest, but at that time had not been used in Oregon. Milan had to work with the Albany fire marshal to find a way to safely use the ACN at Ferry Street, since Zeba could not be manufactured without it. Eventually, a small Hazmet container was placed at Ferry Street and nine totes of ACN were used to transport the ACN from Texas to Albany. All of this was done with the approval of the fire marshal. There were never any spills or releases of ACN at Ferry Street.

In 2004, ATI acquired a larger manufacturing facility on Queen Avenue in Albany. The site had six acres with two 25,000 square foot manufacturing facilities. The first action item was to install a large storage tank for ACN which could hold the contents of a full tanker truck. This greatly streamlined ATI's purchase and handling of ACN. As with Ferry Street, the fire marshal was involved with every step in the installation of the tank and eventually gave ATI permission to proceed. The acrylonitrile tank was surrounded by secondary containment and equipped with vapor detectors, fire detectors, a fire alarm and a foam fire suppression system. Further, a nitrogen blanket was maintained around the tank to ensure that no ACN could come into contact with oxygen in ambient air. Before the first truckload arrived from Dupont (the chemical company supplying the ACN), Dupont sent out its own safety expert to make sure the storage tank was safe. My understanding is that Dupont told Milan that the ACN storage tank was as safe as any facility in the U.S.

With more ACN stored at Queen Avenue, ATI started producing more Zeba every month. Bulk Zeba "dough" was made at Queen Avenue and the dough was finished into the final Zeba granules at Ferry Street. There was never a spill or release of Zeba at Queen Avenue. The factory was sold to FHA in 2006 for \$3.5 million and a twenty year lease was signed. By 2008, ATI was manufacturing and selling one million pounds per year. From 2006 through 2008, half of the money I raised went for larger and more advanced manufacturing equipment at Queen Avenue. The plan was to eliminate the Ferry Street factory and manufacture up to seven million pounds per year at Queen Avenue. Unfortunately, the financial crisis occurred at the end of 2008 and in 2009 and I could not raise enough money for Milan to complete the expansion of Queen Avenue and move all production steps there.

At that point, the business situation at ATI became more challenging. I was unable to raise any private equity to continue operations. I was able to raise enough debt from existing shareholders to continue operations into early 2011. At that point, the employees were put on furlough and the factory was placed on stand-by until I could raise more money. Scotts Miracle-Gro gave ATI a \$2 million Purchase Order to run the factory from October 2011 through April 2012. Once their order was completed, the factory was again placed on stand-by as I looked for more money. At all times when production was suspended, ATI maintained all safety and security measures at the factory, including the nitrogen blanket around the ACN storage tank. Again, there was never any spill or release of ACN.

From January 2003 through the last production run at the factory in 2012, Milan ran the factory, sales and marketing. My employment at ATI focused exclusively on fund raising. Milan worked out of the Queen factory in Albany as well as the corporate headquarters in Beaverton; my office was always only at the corporate headquarters in Beaverton.

In the fall of 2012, a potential investor was seriously considering a major equity investment, but one of their conditions was my promotion to CEO. The Board approved this promotion. Milan agreed to stay on as a paid officer and Board member. That investment did not happen. By March 8 of 2013, I had been unable to raise any equity and ATI filed for Chapter 11 bankruptcy. The bankruptcy judge agreed to let ATI file for Chapter 11 bankruptcy because one of ATI's outside Board members and United Phosphorus Ltd, the largest agriculture distribution company in India were interested in rescuing ATI from bankruptcy and starting up operations again. They provided \$1.2 million of Debtor-in-Possession (DIP) financing from March 8 through October 7. This financing allowed ATI to maintain a skeleton crew at Queen Avenue and continue to make sure the ACN was safely stored.

The Albany fire marshal, Mike Trabue, was kept informed of ATI's progress in the Chapter 11 proceeding. Milan and I gave him an update on July 10 and again on September 30. We promised that we would immediately notify him if there were any changes to the Chapter 11 plans. In early October, there was a change. On October 2, ATI and the owners of the Queen Avenue property had a meeting with the bankruptcy judge regarding the ATI lease. FHA requested permission to terminate the lease since the next door neighbor had offered to buy the Queen Avenue factory from them. ATI argued against termination of the lease, since that would end the DIP financing and any chance ATI had to emerge from Chapter 11 bankruptcy with a viable plan to restart operations. When the judge did not rule in favor of ATI by midnight on October 7, the lease was automatically terminated and ATI was forced to file for Chapter 7 bankruptcy.

I called Mike Trabue on October 8 to let him know about the judge's ruling. Milan and I met with Mike Trabue on October 9, along with Dave Ellis from FHA since they would be taking over possession of the factory. We gave Dave and Mike a list of all the bills that would need to be paid (especially the purchase of nitrogen) to maintain the security systems associated with the ACN tank. ATI kept one person on site through March 11 for security. At that point, FHA and the fire marshal took over control of the facility and changed the locks. On October 14, I received a letter from the City of Albany asking for a plan for the safe removal of the ACN from the Queen Avenue property. Milan prepared a plan and it was emailed to Mike Trabue on October 15. On October 16, Milan presented his plan for removal of the ACN to the EPA. Essentially, Milan proposed to manufacture Zeba "dough" using normal production processes; however, because ATI lacked funds to finish and distribute the product, the bulk Zeba dough would have

been sent to a local landfill rather than finished for application as an agricultural amendment. The ACN would have been consumed in the production process and would present no future risk. Following this final production run, an environmental contractor would be brought in to clean out and dispose of any residual material in the ACN tank. Manufacturing the Zeba would have taken 2½ weeks at a cost of \$40,000. My understanding is that the EPA chose instead to transport the ACN to an incinerator in Deer Park, Texas.

I have attached a schedule of all the communications with Mike Trabue and the key bankruptcy dates, along with a list of all the bills I told Mike and Dave Ellis needed to be paid. Milan's plan for the safe disposal of the ACN is also included.

ATI always planned to emerge from Chapter 11 bankruptcy, use the ACN on site to start making Zeba again and successfully restart operations. ATI did not abandon the factory or the ACN tank. The bankruptcy judge terminated ATI's lease and FHA and the fire marshal changed the locks on the gate. ATI offered to put three people on site to safely process the residual ACN into Zeba, but that plan was rejected by the EPA. The owners of FHA and the lawyer representing FHA were told before the judge issued her ruling that they would be responsible for safely storing and then disposing of the ACN. They decided to proceed anyway. There was never a release or a threat of a release of the ACN. Dan Heister, EPA's on-scene coordinator, told the Albany Democrat Herald that the state-of-the-art plant was in impeccable shape, and that Absorbent Technologies had left a two week supply of nitrogen for the 20,000 gallon tank, as well.² Mr. Heister further stated that EPA was "going way overboard for safety" in its removal of the ACN.

Inaccessibility of Business Records:

When the termination of the Queen Avenue lease forced ATI into Chapter 7 bankruptcy, Ken Eiler was appointed by the Bankruptcy Court as the Trustee to oversee the liquidation of the ATI assets. Mr. Eiler took over physical possession of all ATI assets, including the computer servers located at the corporate headquarters in Beaverton and the manufacturing facility in Albany, the laptops of all remaining employees and all the paper files in Beaverton and Albany. With a few exceptions noted below, I will be unable to provide any emails, calendars, contact information, organization charts, corporate minutes, insurance contracts or other ATI information requested by the EPA. I was told by the ATI Information Technologies manager that he was asked to set up the corporate servers so the EPA could review the information on the servers, but I never received confirmation that this review happened. Ken Eiler would be able to answer this question and provide access to my laptop if other information is needed.

Response to CERCLA 104(e) request:

1a: David C. Moffenbeier, [REDACTED] Lake Oswego, OR. 97034

1b: See response to 1.a. No other persons responding

1c: No other designated individual

² "Feds Secure Site of Bankrupt Chemical Company," Albany Democrat-Herald (October 19, 2013)

1d: I have never held a real or personal property interest in 140 Queen Avenue. I was an employee of ATI between January 2003 and October 2013. I was the CFO of ATI from 2003 through September, 2012. I was the CEO from September, 2012 until October, 2013. Between 2010 and today, I have owned less than 1% of the stock of ATI. I have never owned more than 10% of ATI stock; the percentage of stock I held in ATI declined steadily between 2003 and 2010 as ATI raised capital through stock sales to outside investors.

1e: (1) I was on the Board of Water Conservation Technologies (WCT). I was not an employee of WCT. WCT purchased some of the manufacturing equipment used by ATI at its Ferry Street and Queen Avenue manufacturing facilities and leased them back to ATI. (2) David Ellis and Farouk Al-Hadi were the landlords of the Queen Avenue facility leased by ATI between 2006 and October 2013. (3) ATI licensed the Intellectual Property for manufacturing a product called Zeba from D2 Polymer Technologies for an annual fee. I have no business relationship with D2 Polymers Technologies.

1f: I own less than 1% of the ATI stock. I do not understand what EPA means by "prior affiliated entities ... that have or previously had any legal or equitable interest in ATI." I have not previously had any legal or equitable interest in another entity with a legal or equitable interest in ATI. I will attempt to provide copies of stock certificates as a supplement to this response.

1g: Milan Savich was the CEO of ATI with complete responsibility for manufacturing operations at Ferry Street and Queen Avenue during all times those two factories were operating. In 2010, when operations were running 24 X 7, Milan had five managers working for him in Albany. This staff included Joe Koerner, Director of Manufacturing, John Blanchard, Controller, Rick Klafka, Engineering, Glenda Fleming, HSE Manager and Roger Coddington, Purchasing Manager. When operations were suspended in early 2011 due to lack of funding, Joe Koerner and Rick Klafka left for other work. John, Roger and Glenda continued to work for Milan when the factories were reopened from October, 2011 until April, 2012 to fill a special order for Scotts Miracle-Gro. Once that order was fulfilled, the factories were suspended again and were not restarted due to the Bankruptcy Court's termination of the Queen Avenue facility lease in October 2013. I do not have contact information for any of ATI's former employees (other than Milan); please see my statement above regarding the bankruptcy trustee's possession of ATI's business records. I believe that EPA has Milan's contact information. My understanding is that David and Pam Ellis and Farouk Al-Hadi are or were the owners of the Queen Avenue property and that Lombard Foods Inc. is or was the owner of the Ferry Street property.

2a, 2b, 2d: I have no such documents in my possession. Please see my statement above regarding the bankruptcy trustee's possession of ATI's business records.

2c: To the best of my knowledge, there were no spills or releases of hazardous materials at either the Queen Avenue property or the Ferry Street property prior to termination of the Queen Avenue lease or to conversion of ATI's bankruptcy to Chapter 7 and the appointment of an outside trustee.

3a: Copies of my tax returns for 2010, 2011, 2012 and 2013 are attached. Please note that I have designated these as "Personal Privacy Information" and am providing the tax returns in a separate attachment. To the extent this question seeks tax records for ATI, I have no such documents in my possession. Please see my statement above regarding ATI's business records.

3b: Please see the ability to pay information provided below.

To the extent this question seeks financial information for ATI, I have attached the July, 2013 Monthly Operating Report submitted to US Bankruptcy Court. A similar report was submitted to the Court every month during the time when ATI was in Chapter 11 bankruptcy. The reports stopped when ATI was forced into Chapter 7 bankruptcy. I have no further such information in my possession; please see my statement above regarding ATI's business records.

3c: This request appears to seek financial information concerning ATI; I have no such information in my possession. Please see my statement above regarding ATI's business records.

3d: This request appears to seek financial information concerning ATI; I have no such information in my possession. Please see my statement above regarding ATI's business records.

3e: Milan Savich and I were the two primary officers for ATI. Milan's salary averaged \$ [REDACTED] over the last three years. My salary averaged [REDACTED]. Milan and I each received a \$50,000 loan when ATI was founded in 2003 to pay for the original stock purchase. Both loans are still outstanding.

3f: No one owned more than 80% of ATI's outstanding stock the last three years.

3g: I am no longer employed by ATI and have no information about current or anticipated litigation. As discussed above, ATI is in Chapter 7 liquidation proceedings.

3h: See Response to 3.g above. All financial settlements are being handled by the Chapter 7 Trustee.

3i: I am a person, not a corporation. To the extent this question seeks information about ATI, ATI was never a subsidiary of or otherwise legally affiliated with any other corporation.

3g (sic): I am a person, not a corporation. To the extent this question seeks information about ATI, ATI had no predecessors-in-interest.

3h (sic): I am a person, not a corporation. To the extent this question seeks information about ATI, I have no financial records, corporate minute books or annual reports in my possession. Please see my general statement above regarding ATI's business records.

5a: I am attaching copies of insurance policies in my possession. Please see my general statement above regarding ATI's business records.

5b: Please see Response to 5.a. Please note that both AIG and Navigators have denied coverage for this matter.

5c: Property, General Liability and Pollution policies were with Chartis. D&O policy was with Navigators. I am not sure about the other carriers. All the insurance was written by Willis. Again, I do not have access to ATI's business records.

5d: Recent communications from Chartis and Navigators are attached.

5e: No previous settlements.

Schmidt, Grechen

April 29, 2014

Page 7

5f: Please see my general statement above regarding ATI's business records.

5g: I do not have a personal document retention policy. ATI's documents are being held by the Chapter 7 Trustee

6a: Please see the background information provided above and attached to this letter.

6b: Milan Savich can provide more information about the manufacturing operations at Ferry Street and Queen Avenue. He is filling out a similar Information Request. I understand that EPA has Milan's contact information.

6c: Please see my general statement above regarding ATI's business records.

7a: Other than my attorney, I have not consulted other people.

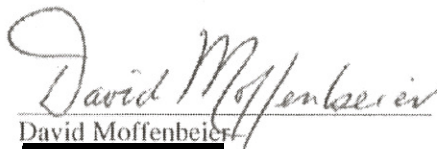
7b: All documents in my possession concerning this matter are provided with this response. Please see my general statement above regarding ATI's business records.

Ability to Pay Statement:

I have attached a Personal Financial Statement prepared for US Bank. Please note that I have designated this as "Personal Privacy Information" and am providing this statement in a separate attachment. The bank has a second mortgage on my house. As you can see from the financial statement, I have no ability to pay any claim. I have recently signed a one month consulting agreement with an Arizona startup company but do not at this time have permanent employment. I have no cash or other current assets. My only long term asset is the equity in my home. My debts exceed the equity in my home by [REDACTED]

DECLARATION

I declare under penalty of perjury that I am authorized to respond on behalf of Respondent and that the foregoing is complete, true, and correct.


David Moffenbeier

[REDACTED]
Lake Oswego, OR. 97034
[REDACTED]

cc: Ted Yackulic, Assistant Regional Counsel, Office of Regional Counsel, ORC-158
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